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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

MATTHEW DONALD JOHNSON,
Petitioner

v.

STATE OF TEXAS,
Respondent

NO. --------

MARION ERNEST McMILLAN
Petitioner

v.

STATE OF TEXAS,
Respondent

RESPONSE IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent herein and files this response in reply to Petitioner's petition for Writ of Certiorari heretofore filed herein.

OPINION BELOW

The Opinion of the Court of Criminal Appeals of Texas, is reported at *467 S.W.2d 247,* and also appears in the appendix to Petitioner's petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on April 14, 1971. Motion for Rehearing was denied without a written opinion on June 9, 1971, this Court's jurisdiction is invoked under 28 U.S.C., Section 1257, (3). Accordingly, the jurisdictional requirements would appear to be satisfied, although Respondent refutes Petitioner's contention that any right guaranteed by the Constitution of the United States has been denied him.

QUESTIONS PRESENTED

1. Whether under the circumstances of this case it was a denial of due process to refuse a change of venue.

2. Whether it was a denial of due process, under the circumstances, to refuse voir dire examination of each venireman separate from the others.

3. Whether it was a denial of due process, under the circumstances, to restrict voir dire questioning about black power and militancy.

4. Whether Texas procedure with respect to jury prejudices and misconduct, as applied in these cases, was a denial of due process.

5. (McMillan only) Whether the trial of McMillan for a felony was double jeopardy after he had already been placed under a peace bond.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Of concern here is the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

The other state statutes involved appear as an appendix at page 14 of Petitioner's application for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners were convicted of injuring property belonging to another, the extent of the injury being over the value of fifty dollars ($50.00); the punishment as to each Petitioner, ten (10) years.

On July 1, 1968, at about 10:30 p.m., a group of 30 to 50 Negro people, many of them dressed in a manner somewhat different from the dress of the ordinary customer, entered the O.K. Super Market one at a time. Petitioners McMillan and Johnson were the first of the group to enter the store. They went to all parts of the store while Petitioners walked to the back. At this point, the employees heard glass breaking in the area in which the Petitioners were standing.

Merchandise in the store was scattered, broken, mutilated, and commingled by the persons who had entered the store. Describing the scene, an employee stated:

"There was milk and eggs all mixed together with cereal and sugar, watermelons and mustard, just most anything you could imagine was busted and broken."

Five minutes after they entered the store, the group left. Petitioners were the last to leave. A partial listing of the destroyed merchandise, which had a value in

excess of fifty dollars, includes: 3 one-gallon jugs of milk, 2 five-pound bags of sugar, 2 one-quart containers of mustard, over seventeen pounds of tomatoes, several cartons of eggs, four boxes of detergent, many bottles of pickles, two quarts of cooking oil, many watermelons, and 12 one-pound packages of oleo. An employee saw Petitioner Johnson break two bottles of grape juice and drop a watermelon twice. He also saw Petitioner McMillan take a gallon bottle of milk out of the dairy container and drop it, breaking the container.

Later the same evening, after the store was cleaned up, Petitioners re-entered the store, bought some beer and McMillan commented, "These white people sho keep a nice clean store."

ARGUMENT AND AUTHORITIES

Petitioners' first contention is that the trial court erred in refusing a change of venue and that the trial judge favored the State in the venue hearing by admitting affidavits in lieu of witnesses. The testimony introduced by Petitioners at the venue hearing showed that Petitioners had been the subject of items on a news program of one of the major television stations in Dallas approximately four times in the preceding month; that a television newsman had read about them in the local newspapers eight to twelve times in recent months; that the Petitioners were newsworthy because they had opinions diverging from that of the majority of the public and because they had obtained an option to purchase a chain of grocery stores, one of which was the supermarket where the offense took place. Further testimony indicated that publicity, both in the newspapers and on television had shown that McMillan was

a field secretary for the Student Non-Violent Coordinating Committee; that SNCC had a widespread reputation for being militant in black affairs; that there was publicity involving the incident at the supermarket out of which these charges arose; and that Petitioners' unusual manner of dress and hair style tended to cause a feeling of resentment among people in Dallas. Petitioners also showed that they might be associated in the eyes of the public with destruction of property, interruption of business activities and conduct leading up to riots. All the *defense* witnesses testified that they were of the opinion that Petitioners could not receive a fair trial in Dallas County. However, they all testified that they could be fair and impartial jurors in Dallas County in spite of all the publicity with which they had come in contact.

In connection with the change of venue contention, it is well to observe that it was shown that Dallas County has a population of over one million persons. Further, this record shows efforts on the part of the trial court to restrict pre-trial publicity.

Rideau v. Louisiana, 373 U.S. 723 (1963); *Groppi v. Wisconsin,* 400 U.S. 505 (1971) and *Sheppard v. Maxwell,* 384 U.S. 333 (1966), cited by Petitioners are readily distinguishable from the case at bar.

There is no showing in this record that there were inherently suspect outside influences affecting the community's climate of opinion as to defendants which would result in a probability of unfairness. These Petitioners were tried by an impartial jury and Petitioners failed to show that the population was so saturated with prejudice that no impartial jury could be selected.

At the close of the evidence in the hearing on the motion for change of venue, the State introduced seven affidavits stating that the Petitioners' witness did not have sufficient knowledge on which to base their opinions that the Petitioners could not obtain a fair and impartial trial in Dallas County. Petitioners objected to the introduction of these affidavits into evidence; the objection was overruled. Such affidavits controverted the source of knowledge of the Petitioners' witness, as is permitted by Art. 31.04, V.A.C.C.P. No affidavits were offered by the Petitioners.

Petitioners next contend that the unusual nature of the case required individual voir dire examination, and in light of the record the trial judge's refusal was error and a denial of due process. In *Streight v. State,* 138 S.W. 742 (62 Tex. Crim. 453), reversed on other grounds, the Texas Court of Criminal Appeals held that in an extreme case it would be reversible error for the trial court, on motion, to refuse to exclude the veniremen from the courtroom during the selection of a jury. That case involved much more pre-trial publicity and prejudice than does the case at bar.

Petitioners next contend that the trial court erred by not allowing defense counsel to ask prospective jurors certain questions on the voir dire examination. In the examination of one prospective juror, Petitioners' counsel asked the following question: "Do you allow your daughter to wear mini skirts?" The juror answered: "Yes, she wears —."

The court also refused to let the defense question a venirewoman, who was subsequently a juror, about her political affiliations, whether she was a Democrat or Republican. Petitioners have failed to show that the

trial court abused his discretion in refusing to allow those questions and have failed to show how those questions were relevant to exercising their peremptory challenges.

Petitioners were allowed to question one venireman, who subsequently became a juror, at some length about his understanding of the term "Black Power." Upon the State's objection, the court then instructed that the venireman be interviewed at the bench rather than have the entire jury panel hear the questions. Defense counsel then refused to ask any more questions regarding "Black Power" and, instead, he began to question the venireman regarding the range of punishment in the case.

Petitioners' counsel later questioned another venireman, subsequenlty a juror, regarding his idea of what the term "Black Power" meant. The State objected and the court sustained the objection. Defense counsel, however, continued questioning regarding the juror's definition of the term "Black Power." Under the circumstances, the trial court did not abuse its discretion. This does not present a federal question for review.

Petitioners next contend that the hearing on the motion for new trial was a nullity because the same was not held within the 20 days provided by statute, citing *Brown v. State,* 353 S.W.2d 425 and *Brinkley v. State,* 320 S.W.2d 855. Their motion for new trial was based on jury misconduct and had an affidavit of a juror attached thereto. Petitioners reason that when the motion was overruled by operation of law, it was automatically reversible error. At the hearing on the motion for new trial, Petitioners refused to participate due to their contention that the hearing was a nullity.

In this case, the court granted the State a continuance of the hearing in order to have more time to secure evidence that jury misconduct had not, in fact, occurred. At the hearing, the court considered testimony and affidavits from the remaining eleven jurors, who stated that such misconduct did not occur.

In the interest of justice, the action of the court was proper in order to show that the affidavit attached to Petitioners' motion for new trial did not reflect the true facts. This does not present a federal question.

Petitioner McMillan contends that he was subject to double jeopardy because he had a hearing by a Justice of the Peace on a peace bond. In Texas a peace bond is conditioned that "he will not commit such offense, and that he will keep the peace towards the person threatened or about to be injured, and toward all others named in the bond for any period of time, not to exceed one year from the date of the bond." (See: Tex. Code of Crim Proc., Art. 7.03.*) It is clearly a preventative measure taken to insure that the defendant will not repeat the act or acts threatened under penalty of paying the amount of the bond. This is based on future acts and is not punishment or determination of criminal activity. It is by no means a criminal trial within the purview of the jeopardy provision of the Fifth Amendment of the United States Constitution.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

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*Attached as Appendix "A".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, attorney for Respondent, do hereby certify that a copy of the above and foregoing Response In Opposition To Granting Of Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas has been deposited in the United States Mail, postage prepaid, on this the __ day of October, 1971, to the following address: Frank P. Hernandez and Vincent W. Perini, 710 Elm Street, Dallas, Texas 75202.

GILBERT J. PENA
Assistant Attorney General

APPENDIX "A"

Art. 7.03 [80] [125] [115] Accused brought before magistrate

When the accused has been brought before the magistrate, he shall hear proof as to the accusation, and if he be satisfied that there is just reason to apprehend that the offense was intended to be committed, or that the threat was seriously made, he shall make an order that the accused enter into bond in such sum as he may in his discretion require, conditioned that he will not commit such offense, and that he will keep the peace toward the person threatened or about to be injured, and toward all others named in the bond for any period of time, not to exceed one year from the date of the bond. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.